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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 710

ALLENTOWN BROADCASTING CORPORATION,
PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

Neither the *per curiam* opinion of the Court of Appeals (Pet. 1a–5a) nor the decision of the Federal Communications Commission (R. 156–219) has yet been reported.

JURISDICTION

The judgment of the Court of Appeals, affirming the decision of the Commission, was entered on December 16, 1955 (Pet. 6a). A petition for rehearing *en banc* was denied on January 23, 1956 (Pet. 7a). The petition for a writ of certiorari was filed on February 23, 1956. The ju-

risdiction of this Court is invoked under 28 U. S. C. 1254 (1) and Section 402 (j) of the Communications Act of 1934, as amended, 47 U. S. C. 402 (j).

QUESTIONS PRESENTED

1. Whether the Court of Appeals failed to comply with this Court's mandate in *Federal Communications Commission* v. *Allentown Broadcasting Company*, 349 U. S. 358, because on remand it affirmed the Commission's order in a brief *per curiam* opinion.

2. Whether the Commission, in granting an application to construct a radio broadcasting station, adequately considered the applicant's newspaper, radio and television interests.

STATUTE INVOLVED

The pertinent provisions of the Communications Act of 1934 are set out in the petition, pp. 2–4.

STATEMENT

The petitioner, Allentown Broadcasting Company (Allentown), and Easton Publishing Co. (Easton) filed with the Federal Communications Commission in 1945 mutually exclusive applications for permits to construct standard broadcast stations in Allentown, Pennsylvania, and Easton, Pennsylvania, respectively. A comparative hearing was held in 1946, resulting in a grant of Allentown's application. On appeal by Easton, the grant was reversed, and the proceedings were

remanded to the Commission. *Easton Publishing Company* v. *Federal Communications Commission,* 175 F. 2d 344 (C. A. D. C.).

After further hearings, the Commission granted Easton's application and denied Allentown's (R. 156–219). It held that the two applicants were qualified to serve their respective communities and that each community needed the service which the applicant proposed to render it, but that since Allentown had three local stations and Easton only one, Easton's need for a choice between locally originated programs was, under Section 307 (b) of the Communications Act of 1934, the decisive factor.

On appeal, the Court of Appeals again reversed the Commission's decision. *Allentown Broadcasting Corp.* v. *Federal Communications Commission,* 222 F. 2d 781 (C. A. D. C.). It held that there was no substantial evidence to support Commission findings that the applicants were equally qualified to serve their respective communities, and that without such a finding the Commission had erred in applying the "choice of local service" principle. It also held that the Commission had erroneously rejected certain findings of the examiner.

This Court in turn reversed the Court of Appeals. *Federal Communications Commission* v. *Allentown Broadcasting Company,* 349 U. S. 358. It held (pp. 361–362) that the Commission, in

selecting among mutually exclusive applications to serve different communities, "first determines which community has the greater need for additional services and then determines which applicant can best serve that community's need," and is not required first to find that the applicants are equal in their abilities to serve their respective communities. The Court stated (p. 363) that the record at the second hearing contained "substantial evidence to support its [the Commission's] conclusion as to Easton's need and its applicant's superior capacity to serve that need." Noting that the Court of Appeals had agreed with the Commission's examiner and disagreed with the Commission in evaluating three factors in the record asserted to require denial of Easton's application,[1] this Court concluded (pp. 363–364) that none of those factors "are in themselves a bar to the Commission's grant of license"; and that the record contained "substantial evidence * * * pro and con" concerning those factors. This Court also held (p. 364) that the Court of Appeals had erred in concluding that an agency cannot overrule an ex-

[1] These factors were: Easton's "uncertainty" as to programming; the alleged "reluctance, evasiveness and lack of candor" of Easton's principal witnesses; and "the concentration of local communications media in the hands of the Easton applicant who was the publisher of the only local newspaper, the licensee of one of two FM radio stations and of the only television station" in Easton (349 U. S. at 363).

aminer's findings based on demeanor of a witness without a "very substantial preponderance in the testimony as recorded."

This Court concluded (p. 365) that although the errors of law committed by the Court of Appeals required reversal of the latter's decision, it would not reinstate the Commission's determination, since that would make this Court rather than the Court of Appeals the reviewer of the Commission's ultimate determination. Accordingly, the case was remanded to the Court of Appeals "for reconsideration of the record but freed from rulings declared erroneous in this opinion."

On remand, the Court of Appeals, after further written and oral argument, affirmed the Commission's decision awarding the grant to Easton. In a *per curiam* opinion (Judge Bazelon dissenting) (Pet. App. 1a–5a), the court stated that it found "no substantial error on the part of the Commission in the features of the case remaining open to our consideration." A petition for rehearing *en banc* was subsequently denied (Pet. App. 7a).

ARGUMENT

1. Petitioner contends (Pet. 7) that, upon remand by this Court, the Court of Appeals failed to comply with this Court's mandate because it did not determine whether the Commission's decision was "supported by adequate findings based on substantial evidence in the record as a whole." Petitioner argues that since the Court of Appeals

did not write a lengthy opinion discussing its contentions, but restricted itself to a *per curiam* statement that it had found "no substantial error" on the Commission's part as to "the features of the case remaining open to our consideration," the court in fact treated its duties on remand as limited to "ministerial reinstatement of the Commission's decision" (Pet. 10).

But the lack of detailed discussion of petitioner's contentions affords no basis for assuming that the court below "ministerially reinstated" the Commission's decision. On the contrary, the court pointed out that it had "reviewed the matter and heard oral argument," and it concluded, on the basis of such review, that there was "no substantial error" in the "features of the case" which still remained open after this Court's decision, namely, whether under the correct interpretation of the Act and after giving proper weight to the Commission's rejection of the examiner's findings, the Commission's findings supported its order and had adequate evidentiary basis.

The findings which the Court of Appeals previously had set aside as unsupported by substantial evidence were those which it deemed "essential underlying findings" as to the applicants' "approximately equal" ability to serve their respective communities. 222 F. 2d at 784. This Court, however, held that a comparison of such

abilities was not "essential" to the Commission's selection of the applicant proposing to serve the community with the greater need for local service. As a result, the case was in a different posture upon remand, and findings previously deemed significant by the lower court were no longer entitled to the same weight. Furthermore, this Court had held that none of the three factors relied on by the Court of Appeals as grounds for reversal was itself a bar to the grant of a license, and it pointed out that there was "substantial evidence" in the record "that had to be weighed, pro and con," as to each of those factors. It also held that the lower court had applied an unduly restrictive standard in setting aside the Commission's rejection of the examiner's findings.

Under these circumstances, it is hardly surprising that the court below reached a conclusion on remand contrary to that reached in its prior consideration. We submit that the Court of Appeals gave adequate consideration to those issues which were open to it upon remand, and that it correctly upheld the Commission's decision to grant a license to Easton.

2. There is no merit in petitioner's contention (Pet. 11–16) that the Commission failed to give adequate consideration to Easton's interests in other media of communication in that city. The question whether Easton's newspaper, radio and television holdings required denial of its applica-

tion was in issue in the comparative hearing, and considerable testimony was adduced concerning it. The Commission made detailed findings of fact with respect to Easton's other interests (R. 165, 170–172), as well as with respect to other communications media serving the Easton community (R. 188–191, 199). In paragraph 5 of its conclusions (R. 206–207), the Commission fully considered Allentown's contentions in this regard. It found that the evidence did not support Allentown's allegation that Easton had used its local newspaper in attempting to obtain a news monopoly "or otherwise in a manner not in the public interest," and it concluded that although "diversification of the sources of news may be an element in determining the public interest in the grant of an application," Easton was not disqualified because of its other communications interests.

Petitioner errs in contending that the decision below, upholding the Commission's determination that Easton was not disqualified because of its newspaper, television and radio interests, conflicts with the decision of another panel of the same court in *Clarksburg Publishing Company* v. *Federal Communications Commission,* 225 F. 2d 511 (C. A. D. C.). In the *Clarksburg* case the court held that the Commission had erred in dismissing *without a hearing* a protest to the grant without hearing of a television application. The

protest alleged that because of the applicant's substantial newspaper interests and its undue concentration of control of mass media of communications, it would not be in the public interest to grant the application, and the court held that the protest raised issues which required a hearing. In the instant case, on the other hand, the Commission has held a full hearing on that very question, and has concluded on the basis of the record that the applicant's other interests do not require denial of the grant.

The petition does not present any question "vital to the administration of the Communications Act which has not heretofore been decided by this Court" (Pet. 11), but only issues as to the sufficiency of the Commission's findings and their evidentiary support.[2] The Court of Appeals fully considered those questions and concluded that there was "no substantial error" in the Commission's proceedings. Plainly, no question is presented justifying further review by this Court.

[2] Judge Bazelon's dissent in the present case was in part derived from his apparent disagreement with the Commission as to the significance of the evidence (Pet. App. 4a), and in part from his disagreement with the majority as to whether the Commission had in fact given "any consideration to the question" whether the public interest would be served by increasing the number of communications interests owned by Easton in its community. (Pet. App. 3a.) He did not suggest, as does petitioner, that the majority was departing from the rule of law laid down in the *Clarksburg* case.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

SIMON E. SOBELOFF,
Solicitor General.
STANLEY N. BARNES,
Assistant Attorney General.
DANIEL M. FRIEDMAN,
Attorney.

WARREN E. BAKER,
General Counsel,
RICHARD A. SOLOMON,
Assistant General Counsel,
DANIEL R. OHLBAUM,
EDWARD W. HAUTANEN,
Counsel,
Federal Communications Commission.

MARCH 1956.

U. S. GOVERNMENT PRINTING OFFICE: 1956